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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DWIGHT J. LOVING, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

I. Whether, because Congress' legislative responsibility to establish aggravating factors in military capital cases involves individual liberties protected by the Fifth and Eighth Amendments, an explicit delegation of legislative power to the President is necessary.

II. If an explicit delegation of legislative authority is not required, whether an implicit delegation of Congress' legislative power to establish aggravating factors may be divined from various and sundry provisions of the Uniform Code of Military Justice.*

III. If there has been such an implicit delegation of authority to the President, whether Congress has established constitutionally adequate standards to guide the President's exercise of legislative authority.

IV. Whether it is consistent with the Framer's intent, the dictates of Articles I and II of the Constitution, and the Eighth Amendment to permit Congress to delegate to the President its responsibility to define aggravating factors which will define the class of servicemembers eligible for the death penalty.

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*The Questions Presented have been rephrased and reordered but the substance has not been changed. Sup. Ct. R. 24(a), ___ U.S. ___, 115 S.Ct. CCCXXXIII (1995). Questions I and II of the Brief were both incorporated in Question II of the Petition for Writ of Certiorari.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces is reported at 41 M.J. 213. Pet. App. 1a-227a.[1] The order denying rehearing is reported at 42 M.J. 109. Pet. App. 228a.

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[1] Pet. App. refers to the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1259(1), the United States Court of Appeals for the Armed Forces (formerly the United States Court of Military Appeals) having reviewed this case pursuant to Uniform Code of Military Justice [hereinafter U.C.M.J.] article 67(a)(1), 10 U.S.C. § 867(a)(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves:

1. U.S. Const. art. I, § 1, which provides, in pertinent part, "All legislative Powers herein granted shall be vested in a Congress of the United States. . . ."

2. U.S. Const. art. I, § 8. cl. 14, which provides, in pertinent part, "The Congress shall have Power. . .To make Rules for the Government and Regulation of the land and naval Forces. . . ."

3. U.S. Const. art. II, § 1, cl. 1, which provides, in pertinent part, "The executive Power shall be vested in a President of the United States. . . ."

4. U.S. Const. art. II, § 2, cl. 1, which provides, in pertinent part, "The President shall be Commander in Chief of the Army and Navy of the United States. . . ."

5. The Fifth Amendment to the United States Constitution, which provides, in pertinent part, "No person shall be. . .deprived of life, liberty, or property, without due process of law."

6. The Eighth Amendment to the United States Constitution, which forbids the infliction of "cruel and unusual punishments."

7. U.C.M.J. article 18, U.S.C. § 818, which establishes the jurisdiction of general courts-martial. J.A. 139.[2]

[2] J.A. refers to the Joint Appendix.

8. U.C.M.J. article 36, 10 U.S.C. § 836(a), which allows the President to prescribe procedural rules for courts-martial. J.A. 140.

9. U.C.M.J. article 56, U.S.C. § 856, which allows the President to prescribe maximum punishments for non-capital offenses. J.A. 141.

10. U.C.M.J. article 118, 10 U.S.C. § 918, which provides that any person convicted of premeditated murder or felony murder "shall suffer death or imprisonment for life as a court-martial may direct." J.A. 145.

11. Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial [hereinafter R.C.M.] 1004(c), which purports to establish the aggravating factors to be used in capital cases under the U.C.M.J. J.A. 132-38.

STATEMENT OF THE CASE

Dwight Loving was serving as a Private (E1) in the United States Army at Fort Hood, Texas, at the time of his offenses and trial before a general court-martial. He was found guilty of attempted murder, premeditated murder, felony murder, and four specifications of robbery, in violation of U.C.M.J. articles 80, 118(1) and (4), and 122, 10 U.S.C. §§ 880, 918(1) and (4), and 922, respectively. On April 3, 1989, the court-martial panel announced three aggravating factors, pursuant to R.C.M. 1004(c)(7)(B) & (J) and R.C.M. 1004(c)(8), J.A. 135-37, and sentenced petitioner to death, a dishonorable discharge, and forfeiture of all pay and allowances.

The United States Army Court of Criminal Appeals (formerly the United States Army Court of Military Review), affirmed Mr. Loving's convictions and sentence without discussion of petitioner's challenge to the constitutionality of R.C.M. 1004. *United States v. Loving*, 34 M.J. 956, *recon. denied*, 34 M.J. 1065 (A.C.M.R. 1992); Pet.

App. at 230a. The Armed Forces Court of Appeals also affirmed Mr. Loving's convictions and sentence, but declined to discuss his challenge to R.C.M. 1004, citing its opinions in *United States v. Matthews,* 16 M.J. 354 (C.M.A. 1983), and *United States v. Curtis,* 32 M.J. 252 (C.M.A.) *cert. denied,* 502 U.S. 952 (1991). Pet. App. 141a-142a.

In *Matthews,* the Armed Forces Court of Appeals held that then-existing military capital sentencing procedures were unconstitutional because there was no requirement "that the court members make specific findings as to individualized aggravating circumstances." *Matthews,* 16 M.J. at 380. The court declared in dicta that the defects could be corrected either by Congress in the exercise of its Article I power, or by the President "in the exercise of his responsibilities as commander-in-chief under Article II, Section 2, and of powers expressly delegated to him by Congress." *Id.*

Following *Matthews,* the President, without Congressional direction, amended the Manual for Courts-Martial, United States, 1969 (Rev. Ed.), to include capital sentencing procedures and specific aggravating factors. Executive Order 12460, 49 Fed. Reg. 3169 (1984); J.A. 146-51. The President subsequently promulgated the Manual for Courts-Martial, United States, 1984, which became effective on August 1, 1984, and included the aggravating factors to be applied in capital cases in R.C.M. 1004(c).[3] J.A. 134-38. The United States Court of Appeals for the Armed Forces, in *Curtis,* held that the establishment of aggravating factors by the President was constitutional.[4] J.A. 88-131.

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[3]R.C.M. 1004 was subsequently amended in February 1986, July 1991, and November 1994.

[4]*See also United States v. Curtis,* 28 M.J. 1074 (N.M.C.M.R. 1989); J.A. 1-87.

SUMMARY OF ARGUMENT

Article I, § 8, cl. 14 of the United States Constitution grants to Congress the exclusive and plenary power to make all laws to be applied to servicemembers in the military justice system. Moreover, the Constitution, this nation's history and this Court's opinions evidence that the President, as Commander in Chief, has no inherent peacetime authority to encroach upon the strictly legislative task of establishing aggravating factors for military capital cases. Furthermore, the creation of aggravating factors, necessary elements in the legislative determination of whether the death penalty is an appropriate punishment in a particular case, potentially impinges upon a servicemembers rights guaranteed by the Fifth and Eighth Amendments. It is for this reason that only an explicit delegation of legislative power by the Congress would justify the President's exercise of legislative power. Because Congress has not explicitly delegated its power in this area, the President's creation of aggravating factors violates the separation of powers doctrine.

Congress has not implicitly delegated its authority to the President. In order to find an implicit delegation, the lower court ignored the fact that the military was granted jurisdiction to try servicemembers for the capital offense of murder in peacetime within the geographical limits of the United States for the first time in 1950. The lower court also disregarded Congress' overriding concern, when enacting the U.C.M.J., that the power of military commanders in the military justice system be limited. Finally, the lower court completely disregarded this Court's rules of statutory construction, which disfavor any inference of Congressional intent delegating authority to the President to determine which servicemembers shall be eligible for the death penalty.

Congress has not set forth an intelligible principle guiding and limiting the President's exercise of legislative power. Article 36 of the U.C.M.J. refers only to principles of law applied in the United States district courts and there were no such capital aggravating factors at the time of the President's promulgation of R.C.M. 1004(c), with the sole exception of factors applicable only to aircraft piracy. Moreover, Article 36 excuses the President from following even this guidance by allowing compliance only in so far as the President "considers practicable." The lack of an intelligible principle guiding the President's discretion renders any purported implicit delegation of authority unconstitutional.

Finally, any Congressional delegation of authority to establish aggravating factors in capital cases is unconstitutional. The intent of the Framers in Article I, § 8, cl. 14 and the Eighth Amendment was for Congress to make all policy judgments concerning what acts would be punished as criminal offenses and what the punishment should be for those offenses. The determination of what offenders will be eligible for the death penalty is a fundamental policy judgment which must be made by Congress as the elected representatives of American society. While Congress may delegate some technical or complex decisions, the determination of aggravating factors is not a decision which falls into this category. Indeed, with the exception of R.C.M. 1004(c), no aggravating factors have been established outside the halls of the legislatures—state and federal—in the modern era of capital punishment. Even assuming that Congress may delegate its authority, it may not make that delegation to the President because such a delegation places in the President, as Commander in Chief, legislative, executive, and judicial powers. This blending of functions is precisely what the Framers endeavored to avoid.

ARGUMENT

I. ONLY EXPLICIT CONGRESSIONAL ACTION IS SUFFICIENT TO DELEGATE AUTHORITY TO THE PRESIDENT TO ESTABLISH RULES OF LAW WHICH INFRINGE UPON INDIVIDUAL LIBERTIES PROTECTED BY THE FIFTH AND EIGHTH AMENDMENTS.

In finding that the President has authority to establish aggravating factors in capital cases, the military court in *Curtis* relied upon the President's inherent authority; U.C.M.J. articles 18, 36, 56, and 106a, 10 U.S.C. §§ 818, 836, 856, and 906a, respectively; and, Congressional silence after R.C.M. 1004 was promulgated. J.A. 105-22. Based on these factors, the lower court concluded "that Congress has—at least, implicitly—delegated this task to the President." J.A. 112 n.9. The military court's analysis was flawed, however, because the power to establish rules and regulations for the government of the armed forces resides wholly in Congress and, thus, any Congressional delegation of authority to establish aggravating factors in capital cases must be explicit.

A. The power to establish rules and regulations for the government of the armed forces during peacetime resides wholly in Congress.

Contrary to the government's assertion in the Brief in Opposition to the Petition for a Writ of Certiorari, BIO at 14, the President has no inherent authority to act in the military justice system and thus the "less stringent" standard of *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975), is inapplicable in this case. The power to create rules and regulations for the government of the armed forces resides wholly in Congress. This conclusion is

inescapable when viewed in light of this nation's history, the plain language of the Constitution, and this Court's opinions.

In the Declaration of Independence, the founders of this country listed a number of grievances against King George III, including his interference with the law-making authority of legislatures and his protection of the armies from criminal punishments for offenses committed against citizens. After listing the transgressions of the executive, the founding fathers declared that the King's was "a history of repeated injuries and usurpations, all having, in direct object, the establishment of an absolute tyranny over these States." Thus, it is obvious from this document alone that this country was founded based upon fear of an executive who creates law, executes it, and acts as judge, jury, and sentencing authority. *See Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 641 (1952) (Jackson, J., concurring); *Reid v. Covert,* 354 U.S. 1, 68 (1957) (Harlan, J., concurring).

To remedy this situation, and to prevent executive or other tyranny from again controlling the United States of America, the Framers of the Constitution created a government which separated the powers of the sovereign into three separate branches.

> Basic to the constitutional structure established by the Framers was their recognition that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 300 (H. Lodge ed. 1888) (J. Madison).

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 57 (1982). With respect to the military, the

primary concern of the Framers of the Constitution was to preclude the executive branch from later laying claim to various powers reserved to Congress. Robert D. Duke & Howard S. Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction,* 13 Vand. L. Rev. 435, 457 (1960).

In separating the powers to prevent tyranny, the Framers of the Constitution made the President Commander in Chief of the military but gave to Congress the power to legislate, to declare war, to raise and support armed forces, to make rules for the government and regulation of the armed forces, and to call forth and govern the militia. U.S. Const. art. I. §§ 1 & 8. Thus, even in the military, the "rulemaking power originates in the Legislative Branch and becomes an executive function only when delegated by the Legislature to the Executive Branch." *Mistretta v. United States,* 488 U.S. 361, 386 n.14 (1989).

As this Court recognized in *Youngstown Sheet & Tube Co.,* 343 U.S. at 587, contrary to the government's assertion that the President had inherent authority as Commander in Chief to seize the nation's steel mills:

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

See also Ex Parte Milligan, 71 U.S. 2, 121 (1866) (the President, as Commander in Chief, "is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is no unwritten criminal code to which resort can be had as a source of

jurisdiction''). Likewise, this Court specifically recognized long ago that:

> If the President can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers.

Reid, 354 U.S. at 38-39. Thus, it is clear that whatever inherent power the President has as Commander in Chief, the Framers of the Constitution never intended and this Court, interpreting the Constitution under its Article III powers, has never construed the President's powers to be broad enough to establish policy or rules for the government and regulation of courts-martial.[5] Because aggravating factors are, in military capital cases, necessary elements in the determination of whether death is an appropriate punishment, their creation is a policy determination which is reserved to Congress.[6] *Sawyer v. Whitley,* 505 U.S. 333, ___, 112 S.Ct. 2514, 2522 (1992); *see also Romano v. Oklahoma,* ___ U.S. ___, 114 S.Ct. 2004, 2009 (1994) (quoting *California v. Ramos,* 463 U.S. 992, 999, 1008 (1983)) (statutory aggravating circumstances are ''substantive factors'' which create the ''legislatively defined category of persons eligible for the

[5]Although the President has no inherent power in this arena, Congress has explicitly delegated authority to the President to set the maximum punishments for non-capital offenses and to establish procedures for courts-martial, U.C.M.J. articles 18, 36, & 56.

[6]Even the Drafter's Analysis of R.C.M. 1004 indicates that after conviction, the finding of at least one specific aggravating factor beyond a reasonable doubt is a ''second 'threshold' which must be passed before death may be adjudged.'' Manual for Courts-Martial, United States, 1984, Appendix 21 at 70.

death penalty''); *Bullington v. Missouri,* 451 U.S. 430, 433 (1981).

B. This Court must construe narrowly any purported delegation of legislative power to establish aggravating factors in capital cases.

In determining whether Congress has delegated its authority to the President to establish aggravating factors in military capital cases, this Court must ''construe narrowly'' any purported delegation. *Kent v. Dulles,* 357 U.S. 116, 129 (1958); *see also Greene v. McElroy,* 360 U.S. 474, 506 (1959). In *Kent,* this Court held, despite the President's inherent authority in foreign affairs and his statutory authority to prescribe rules for the issuance of passports, that the Executive did not have authority to promulgate regulations denying passports to Communists or to demand a non-Communist affidavit from any citizen applying for a passport. In reaching this result, the Court declared that it would not ''readily infer'' that Congress intended to delegate ''unbridled discretion'' to impinge on constitutional rights protected by the Fifth Amendment. *Kent,* 357 U.S. at 129. Specifically, this Court declared that when an individual's constitutional rights are impacted upon, ''it must be pursuant to the lawmaking functions of the Congress. And if that power is delegated, . . .we will construe narrowly all delegated powers that curtail or dilute'' individual rights. *Id.* at 129.

Likewise, in *Greene v. McElroy,* this Court once again recognized that where an interest included within the ''liberty'' concept of the Fifth Amendment was at stake, 360 U.S. at 492, the propriety of governmental action ''should be decided on the narrow[] ground of 'authorization,''' *id.* at 493. The Court held that ''acquiescence or implied ratification'' is not ''enough to show delegation of authority to take actions within the area of questionable

constitutionality.'' *Id.* at 506; *see also Mistretta,* 488 U.S. at 373 n.7 (Court will apply ''narrow construction[] to statutory delegations that might otherwise be thought to be unconstitutional''); *Industrial Union Dep't v. American Petroleum Inst.,* 448 U.S. 607, 645 (1980) (''In the absence of a clear mandate. . .it is unreasonable to assume that Congress intended to give. . .unprecedented power''); *c.f. Hampton v. Mow Sun Wong,* 426 U.S. 88 (1976) (Rehnquist, J., dissenting).

As argued in full, *infra* at 37-50, the Eighth Amendment and the separation of powers doctrine leave no doubt that the establishment of aggravating factors by the President is in an ''area[] of doubtful constitutionality.'' *Greene,* 360 U.S. at 507. Moreover, Mr. Loving's interest in not being executed unlawfully is certainly an interest included in the ''life, liberty, or property'' protected by the Due Process clause of the Fifth Amendment and an interest protected by the Eighth Amendment.[7] *See Gregg v. Georgia,* 428 U.S. 153, 177 (1976) (Fifth and Eighth Amendments impose ''certain limits on the prosecution of capital cases''). Thus, only ''explicit action by lawmakers,'' *Greene,* 360 U.S. at 507, would suffice to render R.C.M. 1004(c) a constitutionally proper exercise of Executive authority. *Cf. Sweezy v. New Hampshire,* 354 U.S. 234, 255 (1957) (legislature must ''direct the use'' of delegated powers which ''causes a deprivation of the constitutional rights of individuals'').

[7]Mr. Loving's status as a member of the armed services does not deprive him of the protections of the due process clause of the Fifth Amendment, *Middendorf v. Henry,* 425 U.S. 25, 43 (1976), or the Eighth Amendment, *Trop v. Dulles,* 356 U.S. 86 (1958). *See also* Earl Warren, *The Bill of Rights and the Military,* 37 N.Y.L.R. 181 (1962). In addition, U.C.M.J. article 55, 10 U.S.C. § 855, provides protection against ''cruel *or* unusual'' punishment and, thus, provides even greater protection than the Eighth Amendment.

II. IN LIGHT OF THE HISTORY OF MILITARY JURISDICTION TO TRY SERVICEMEMBERS FOR NON-MILITARY CAPITAL OFFENSES AND THIS COURT'S RULES OF CONSTRUCTION, NO IMPLICIT DELEGATION OR RATIFICATION OF AUTHORITY MAY BE FOUND WHICH AUTHORIZES THE PRESIDENT TO DETERMINE WHICH SERVICEMEMBERS SHALL BE ELIGIBLE FOR THE DEATH PENALTY.

In asserting that the President was within his authority to establish aggravating factors, the lower court relied, in part, on U.C.M.J. articles 18, 36, 56, and 106a. In addition to ignoring the need for an explicit delegation of authority, in construing these statutes broadly and finding an implicit delegation or ratification of authority, the lower court ignored almost two hundred years of history in which Congress completely withheld from the military the authority to try servicemembers for non-military capital offenses committed during peacetime within the geographical limits of the United States. In addition, the lower court completely disregarded this Court's rules of statutory construction.

A. This nation's entire history prior to enactment of the U.C.M.J. reflects that Congress intended that servicemembers would not be subjected to the death penalty by military courts for non-military capital offenses committed during peacetime.[8]

The American Articles of War, passed in 1776, allowed court-martial jurisdiction over servicemembers for non-military offenses only for ''[a]ll crimes not capital. . . .though not mentioned in the above articles of

[8]For a more detailed history, *see* the Joint *Amicus Curiae* Brief of the Navy-Marine Corps and the Air Force.

war." American Articles of War, 1776, Section XVIII, Article 5, reprinted in W. Winthrop, Military Law and Precedents 971 (2d ed. 1920).[9] Construing the phrase "not capital," as found in the similar provision of the 1874 Articles, American Articles of War, 1874, Section XXVII, Article 62, reprinted in Winthrop at 721, Colonel Winthrop (the "Blackstone of Military Law")[10] declared:

> The Article, by these words, expressly excluded from the jurisdiction of courts-martial, and, by necessary implication, reserves for the cognizance of the civil courts, (in time of peace,) all capital crimes of officers or soldiers under whatever circumstances committed—whether upon or against military persons or civilians. By *capital* crimes is to be understood crimes punished or made *punishable* with death by the common law, or by a statute of the United States applicable to the case—as, for example, murder, arson, or rape.

Winthrop at 721 (footnotes omitted) (emphasis in original); *see also Grafton v. United States,* 206 U.S. 333, 348 (1907) (under the 1776 Articles of War, no crimes of servicemembers are excepted from military jurisdiction "except those that are capital in their nature").

The first time that Congress permitted the military to try a servicemember for the civilian capital offense of murder was during the Civil War. *Lee v. Madigan,* 358 U.S. 228, 233 (1959) (citing 12 Stat. 736 (1863)). The relevant statute limited the military's jurisdiction over the offense, however, to "time of war, insurrection, or rebellion." *Coleman v. Tennessee,* 97 U.S. 509, 513 (1878).[11] Indeed,

[9]This article remained substantially unchanged throughout the nation's history and is now found in U.C.M.J. article 134, 10 U.S.C. § 934. *Parker v. Levy,* 417 U.S. 733, 746 n.36 (1974).

[10]*Reid v. Covert,* 354 U.S. at 19 n.38.

[11]The petitioner in *Coleman* had been sentenced to die by a general court-martial.

this Court held that the statute had no application when "the civil courts were open and in the undisturbed exercise of their jurisdiction." *Caldwell v. Parker,* 252 U.S. 376, 386 (1920) (quoting *Coleman,* 97 U.S. at 515).

Subsequently, in 1916, Congress provided that murder and rape were punishable by death in a court-martial, but also provided that "no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace." American Articles of War, 1916, Article 92; *see also Kahn v. Anderson,* 255 U.S. 1, 9-10 (1921). It was not until 1950, in the U.C.M.J., that Congress extended to military courts the jurisdiction to try servicemembers for nonmilitary capital offenses committed within the geographical limits of the United States in peacetime. U.C.M.J. articles 118, 120(a); 10 U.S.C. §§ 918, 920(a).

Although the military was finally granted jurisdiction of non-military capital offenses in peacetime, the evolution of the U.C.M.J. clearly establishes that Congress intended that death would be an authorized punishment only when Congress and Congress alone decided that the servicemember should be eligible for the death penalty.[12] In addition, one of Congress' overriding concerns in 1950 was providing more safeguards for servicemembers by minimizing opportunities for command influence,[13] which is reflected in a number of articles, including Article 37, 10 U.S.C. § 837 (unlawful command influence of the action of a

[12]*See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services,* 81st Cong., 1st Sess. (1949), *reprinted in* Index and Legislative History of the Uniform Code of Military Justice, at 960-61, 1088 (1950) (Statement of Felix Larkin, Assistant General Counsel, Office of the Secretary of Defense).

[13]Command influence is a term of art in the military, but generally implies a commander's improper influence based on rank and position of authority (either intentionally or unintentionally) on the decisions of court-martial members.

court is prohibited) and Article 67, 10 U.S.C. § 867 (creation of an appellate court composed of civilian judges).[14]

The historical limits on the military court's ability to impose the death penalty make it completely unreasonable to assume that after nearly two hundred years of keeping tight reign on the authority of the military to try servicemembers for non-military capital offenses during peacetime, Congress would utterly abandon all control over the fate of servicemembers by giving the President unfettered discretion to determine which servicemembers would be eligible for these newly recognized capital offenses. *See Lee,* 358 U.S. at 235 (1959) ("We will attribute to Congress a purpose to guard jealously against the dilution of the liberties" of servicemen).

B. When this Court's rules of statutory construction are properly applied, it is clear that Congress did not delegate authority to the President to establish aggravating factors.

In finding an implicit delegation or ratification of authority, the lower court violated at least five basic rules of statutory construction. First, "[a]bsent a clearly expressed legislative intention to the contrary," the language of the statute itself is "regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980); *see also Hubbard v. United States,* ___ U.S. ___, 115 S.Ct. 1754, 1759 (1995); *West Virginia University Hosps., Inc. v. Casey,* 499 U.S. 83, 98-99 (1991). Second, when a statute is ambiguous even after review of the plain language and the legislative history, the Court will construe the statute in a manner which avoids serious doubt of constitutionality. *Concrete Pipe & Prod. of California, Inc. v. Construction Laborers Pension Trust*

[14] Judge Wiss, in his dissent below, also found "the cancerous possibility that command influence" was involved in this case. Pet. App. 178a.

for S. California, ___ U.S. ___, 113 S.Ct. 2264, 2283 (1993). Third, "acquiescence or implied ratification" is not "enough to show delegation of authority to take actions within the area of questionable constitutionality." *Greene v. McElroy,* 360 U.S. at 506-07. Fourth, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price,* 361 U.S. 304, 313 (1960); *see also United States v. X-Citement Video, Inc.,* ___ U.S. ___, 115 S.Ct. 464, 471 and n.6 (1994). Finally, criminal statutes are to be construed narrowly, *United States v. Mersky,* 361 U.S. 431, 440 (1960), and "any uncertainty concerning the ambit of criminal statutes should be resolved in favor of lenity," *United States v. Kozminski,* 487 U.S. 931, 952 (1988); *see also United States v. Thompson/Center Arms Co.,* 504 U.S. 505 (1992).

1. The plain language and legislative history of U.C.M.J. articles 18, 36, and 56 reveal that Congress did not intend to delegate authority to the President to determine under what circumstances a servicemember should be eligible for the death penalty.

Article 18 authorizes a general court-martial to exercise jurisdiction over any offense "under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death *when specifically authorized by this chapter.*" J.A. 139 (Emphasis added). Article 56 authorizes the President to prescribe limits on punishments. J.A. 141. The punitive provisions of the U.C.M.J. reflect that Congress authorized death as a punishment for a number of offenses, but otherwise directed that an offender "shall be punished as a court-martial may direct" within the limits prescribed by

the President.[15] Clearly, Congress did not intend to give the President any authority with regard to the death penalty. It gave him authority in Articles 18 and 56 *only* to set *limits* on punishment which the court-martial panel may not exceed. Logically, no "limit" may be set on a penalty of death. Thus, these provisions are irrelevant to this case.[16]

Article 36 delegates to the President authority to establish rules for "[p]retrial, trial, and post-trial procedures, including modes of proof." J.A. 140. Clearly, under the plain language of the statute, Congress intended only that the President establish *procedural* rules for court-martial; not that he make policy or moral judgments about criminal offenses, criminal defenses, or other legislative judgments related to court-martial proceedings. Indeed, the Armed Forces Court of Appeals has repeatedly recognized this principle. *See Ellis v. Jacob,* 26 M.J. 90, 92-93 (C.M.A. 1988); *United States v. Frederick,* 3 M.J. 230, 236 (C.M.A. 1977); *United States v. Ware,* 1 M.J. 282, 285 (C.M.A. 1976); *see also Parker v. Levy,* 417 U.S. at 784 n.36 (Stewart, Douglas, and Brennan, JJ., dissenting).

In *Curtis,* the military court conceded that if aggravating factors are part of the required legislative determinations, then the President exceeded his authority. However, the court summarily dismissed this issue by finding that aggravating factors are not elements of a crime. J.A. 105. The appropriate question is not whether aggravating factors are elements of a crime, but rather whether aggravating

[15]The punitive articles of the U.C.M.J. include all articles between and including Article 77, 10 U.S.C. § 877, and 134, 10 U.S.C. § 934.

[16]Likewise, the lower court's finding that the President has for many years increased "maximum punishment because of aggravating circumstances" in non-capital cases, J.A. 108, is irrelevant. Pursuant to U.C.M.J. articles 18 and 56, in all the U.C.M.J. punitive articles in which Congress did not authorize death as a punishment, Congress has allowed the President to establish the maximum punishment. Thus, the President has only created aggravating factors to increase a punishment which he established in the first place.

factors are matters reserved for legislative policy decisions and moral judgments.

The determination of who shall be eligible for a sentence of death is the quintessential moral policy judgment which must be made by the legislature alone. The death penalty is the ultimate criminal sanction known to the law.

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. . . . And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring); *see also Woodson v. North Carolina,* 428 U.S. 280, 305 (1976) (Opinion of Stewart, Powell, and Stevens, JJ.). "Capital punishment is an expression of society's moral outrage at particularly offensive conduct." *Gregg,* 428 U.S. at 183 (Opinion of Stewart, Powell, and Stevens, JJ.); *see also Zant v. Stephens,* 462 U.S. 862, 877 n.15 (1983); *McCleskey v. Kemp,* 481 U.S. 279, 319 (1987). Thus, the death penalty is "ultimately understood only as an expression of the community's outrage—its sense that an individual has lost his moral entitlement to live." *Spaziano v. Florida,* 468 U.S. 447, 469 (1984) (Stevens, J., joined by Brennan and Marshall, JJ., concurring in part and dissenting in part).

Moreover, because the legislature is the voice constituted to speak for the people in all instances, including expressing moral outrange, this Court has long held that it is legislatures which must determine whether the death penalty is to be applied to American citizens. For instance, in *Gregg,* 428 U.S. at 175-76 (Opinion of Stewart, Powell, and Stevens, JJ.) (quoting *Furman,* 408 U.S. at 383 (Burger, C.J., dissenting)), this Court emphasized, "[I]n a democratic society legislatures. . .are constituted to respond

to the will and consequently the moral values of the people." Likewise, Justice Powell declared in his dissent in *Furman*, 408 U.S. at 418, that the decision to use capital punishment is uniquely "an area squarely within the historic prerogative of the legislative branch—both state and federal—to protect the citizenry through the designation of penalties for prohibitable conduct." *See also Harris v. Alabama*, ___ U.S. ___, 115 S.Ct. 1031, 1035 (1995); *Penry v. Lynaugh*, 492 U.S. 302, 331, (1989); *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989); *Thompson v. Oklahoma*, 487 U.S. 815, 821 (1988). Therefore, the determination of aggravating factors to "genuinely narrow the class of persons eligible for the death penalty," *Zant*, 462 U.S. at 877, in the Armed Forces, is uniquely the function of Congress. *See Gregg*, 428 U.S. at 176 (quoting *Gore v. United States*, 357 U.S. 386, 393 (1958)) (the specification of punishments is "peculiarly [a] question[] of legislative policy"); *see also Whalen v. United States*, 445 U.S. 684, 689 (1980).

Given the need for policy decisions and moral judgments involved in determining who shall be eligible for a death sentence, the delegation in U.C.M.J. article 36 to establish "procedures" is clearly not an explicit delegation supporting the President's creation of aggravating factors in capital cases. *See Greene*, 360 U.S. at 507 (only "explicit action by lawmakers" is sufficient to delegate authority to infringe on Fifth Amendment rights to "life, liberty, and property"). Likewise, nothing in the legislative history establishes that Congress intended in Article 36 to grant the President broad policy making authority.

Moreover, in determining the implications of these provisions on the capital punishment process, it is necessary to consider the timing of Congress' actions in enacting these provisions. All of these articles were part of the Uniform Code of Military Justice as passed in 1950—22 years before this Court's decision in *Furman*—and they

have not been substantially amended since that time.[17] Congress did not intend (and could not have intended), in 1950, to grant the President the authority to establish aggravating factors in military capital cases satisfying Eighth Amendment principles which did not emerge for more than twenty years. Articles 18, 36, and 56 and their legislative history, therefore, provide no support for the lower court's decision.

> *2. Even if the meaning of U.C.M.J. article 36 is ambiguous, the Court must construe the statute in a manner which avoids serious doubt of its constitutionality.*

This Court has long adhered to a "prudential concern that constitutional issues not be needlessly confronted." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988). Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id.; see, e.g., National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336 (1974). This principle preserves "[t]he elementary rule [] that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Id.* (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895). Moreover, this rule recognizes that "courts will. . .not lightly assume that Congress" intended to infringe upon the Constitution. *Id.* Thus, whenever the unambiguous meaning of a statute

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[17] There were minor amendments to Article 18 in 1968. Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1343. Article 36 underwent minor changes in 1979 and 1990. DOD Authorization Act of 1980, Pub. L. No. 96-107, 93 Stat. 804; National Defense Authorization Act of 1991, Pub. L. No. 101-510, 104 Stat. 1485.

cannot be gleaned from the plain and ordinary language of the statute or even its legislative history, this Court must construe the statute "to attain coherence by obviating constitutional problems." *Concrete Pipe,* 113 S.Ct. at 2283.

Interpreting the statute broadly to include authority to establish the necessary components in the determination of an accused's death-eligibility clearly raises a serious constitutional problem. *Reid v. Covert,* 354 U.S. at 38 ("If the President can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials"). Thus, if there is any ambiguity, this Court must interpret the statute to conclude that Congress did not intend to delegate authority to the President to make moral policy judgments reserved to the legislature.

3. Congressional acquiescence or implied ratification is insufficient to establish a delegation of authority to take actions within the area of questionable constitutionality.

The lower court presumed that Congress was aware of the President's promulgation of R.C.M. 1004, J.A. 121,[18] and inferred that Congressional silence indicated Congress' implicit ratification of the President's actions, J.A. 121-22. In doing so, the lower court cited this Court's opinion in *Power Reactor Development Co. v. International Union of Electrical Workers,* 367 U.S. 396 (1961), for the proposition that "failure of Congress to complain about the content of regulations can be construed to be ratification." J.A. 112. The lower court's reliance on *Power Reactor* is

[18]The lower court noted that U.C.M.J. article 36(b) required, prior to the 1990 amendment, that all rules and regulations prescribed by the President for courts-martial be reported to Congress. J.A. 140.

misplaced. In that case, just as in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), and *Haig v. Agee,* 453 U.S. 280 (1981), Congress had granted *prior explicit* authority to act in specific circumstances to reach a specified "end." This Court only found *implicit* authority for and ratification of the agency's established "means" to reach the end. In petitioner's case, in contrast, Congress has never provided *prior explicit* authority for the President to establish constitutionally required aggravating factors. Furthermore, since *Power Reactor,* this Court has explicitly stated on numerous occasions that, "[a]s a general matter, we are 'reluctant to draw inferences from Congress' failure to act.'" *See, e.g., Brecht v. Abrahamson,* ___ U.S. ___, 113 S.Ct. 1710, 1719 (1993) (quoting *Schneidewind v. ANR Pipeline Co.,* 485 U.S. 293, 306 (1988)).

Moreover, as noted previously, this Court held in *Kent v. Dulles,* 357 U.S. at 129, and *Greene v. McElroy,* 360 U.S. at 507, that Congressional delegations granting authority to infringe upon an individual's Fifth Amendment rights to "life, liberty, and property" must be construed narrowly and must be explicit. "[A]cquiescence or implied ratification" is not "enough to show delegation of authority to take actions within the area of questionable constitutionality." *Greene,* 360 U.S. at 506-07; *Patterson v. McLean Credit Union,* 491 U.S. 164, 175 n.1 (1989) ("Congressional inaction cannot amend a duly enacted statute"); *Johnson v. Transportation Agency,* 480 U.S. 616, 671 (1987) (Scalia, J., joined by Rehnquist, C.J., dissenting) ("one must ignore rudimentary principles of political science to draw any conclusions regarding [Congressional] intent from the failure to enact legislation"); *see also Cleveland v. United States,* 329 U.S. 14, 22 (1946).

4. The views of a subsequent Congress are insufficient to establish the intent of an earlier Congress.

In finding an implicit ratification or delegation of authority, the lower court held that Congress' enactment of U.C.M.J. article 106a, 10 U.S.C. § 906a, J.A. 121-22, and a House Conference Report amounted to a ratification of the aggravating factors promulgated by the President in R.C.M. 1004(c). J.A. 112. In the 1985 enactment of Article 106a—made nearly two years after the President set forth the aggravating factors listed in R.C.M. 1004(c) and more than thirty years after the passage of U.C.M.J. articles 18, 36, and 56—Congress established three specific aggravating factors, but also added "[a]ny other factor that may be prescribed by the President by regulations under section 836 of this title (article 36)." Article 106a(c)(4); J.A. 144. The House Conference Report, stated in part:

> The conferees did, however, adopt a statutory formulation of capital sentencing standards for espionage cases and intend that those standards be implemented in a manner consistent with the provision of Rule for Courts-Martial 1004 of the Manual for Courts-Martial 1984. The conferees do not intend that the enactment of statutory capital sentencing standards for the new Article 106a be construed as affecting the validity of the regulatory capital sentencing standards that already exist for the other capital punishment articles.

H.R. Conf. Rep. No. 235, 99th Cong., 1st Sess. 8, *reprinted in* 1985 U.S.C.C.A.N. 571, 579.

As this Court specifically recognized in *United States v. X-Citement Video, Inc.*, 115 S.Ct. at 471 n.6, "the views of one Congress as to the meaning of an act passed by an

earlier Congress are not ordinarily of great weight, and the views of the committee of one House of another Congress are of even less weight." (Citations omitted). Likewise, as the Court noted in *GTE Sylvania*, 447 U.S. at 118 n.13, a statement in a conference committee report related to subsequent legislation "does not bear strong indicia of reliability. . . . Thus, even when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment." Thus, even if the lower court was correct in finding that the 1985 Congress believed the President had authority under U.C.M.J. article 36 to establish aggravating factors in capital cases, this Congressional interpretation is irrelevant and sheds no light on the wording of U.C.M.J. article 36 or Congressional intent in 1950.

Furthermore, contrary to the military court's conclusion, the express delegation of authority in Article 106a can easily be interpreted to express Congressional belief that, absent an express delegation, the President is without authority to promulgate aggravating factors. *Cf. Kent v. Dulles*, 357 U.S. at 130. Moreover, the statement that the "conferees do not intend that. . .[the amendments to] Article 106a be construed as affecting the validity of the regulatory capital sentencing standards. . .for the other capital punishment articles," clearly indicates that there was no intent for Article 106a to be read as validating or invalidating R.C.M. 1004(c). Thus, if R.C.M. 1004(c) was invalid prior to the amendments to Article 106a, it remains invalid.

Even assuming that the express delegation in Article 106a to establish aggravating factors for espionage offenses in conjunction with the Conference Report represent an ex post approval of the President's decision establishing aggravating factors for other capital offenses, it is still inadequate. Legislative authority with respect to all other

capital cases may be delegated—just like any other act of Congress—only in accordance with the procedures established in Article I of the Constitution, i.e., "bicameral passage followed by presentment to the President." *INS v. Chadha,* 462 U.S. 919, 954-55 (1983).

5. Criminal statutes must be construed narrowly and, under the rule of lenity, any ambiguity must be resolved in favor of the individual.

This Court has long held that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States,* 401 U.S. 808, 812 (1971); *see also Liparota v. United States,* 471 U.S. 419, 427 (1985); *Wiltberger v. United States,* 18 U.S. (5 Wheat) 76, 95 (1820). "[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct—we apply the rule of lenity and resolve the ambiguity" in favor of the individual, *United States v. Granderson,* ___ U.S. ___, 114 S.Ct. 1259, 1267 (1994). Thus, even assuming there is some ambiguity in U.C.M.J. articles 18, 36, and 56, the rule of lenity requires that the statutes be construed in favor of the individual and in favor of requiring Congress, in the exercise of its legislative powers, to establish the aggravating factors in capital cases. *Cf. Smith v. Goguen,* 415 U.S. 566, 575 (1974); *Papachristou v. City of Jacksonville,* 405 U.S. 156, 168-70 (1972).

The rule of lenity is rooted in "'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *United States v. Bass,* 404 U.S. 336, 348 (1971) (quoting H. Friendly, Benchmarks 209 (1967)). Surely, the distaste for an individual being sentenced to die without a clear Congressional statement that the President has authority to establish aggravating

factors is just as strong. The rule of lenity requires a finding that Congress made no such delegation.

III. ANY IMPLICIT DELEGATION OF AUTHORITY TO THE PRESIDENT TO ESTABLISH AGGRAVATING FACTORS IS INVALID BECAUSE CONGRESS HAS NOT SET FORTH SUFFICIENT STANDARDS TO GUIDE THE PRESIDENT.

A delegation of legislative authority to the President, or to any other agency, is valid only "[s]o long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'" *Mistretta,* 488 U.S. at 372 (quoting *J.W. Hampton, Jr. & Co. v. United States,* 276 U.S. 394, 409 (1928)); *see also American Power & Light, Co. v. SEC,* 329 U.S. 90, 142 (1946). In other words, Congress must outline "the field within which [the delegate] is to act so that it may be known whether he has kept within it in compliance with the legislative will." *Yakus v. United States,* 321 U.S. 414, 425 (1944).

As noted previously, the lower court found only an implicit delegation or ex post ratification of authority. Therefore, *a fortiori* the lower Court could not (and did not) find an intelligible principle set forth in a statute which explicitly delegated authority to the President. Attempting (unsuccessfully) to solve this problem, the lower court looked to the language of U.C.M.J. article 36, which "directs that the President 'shall, *so far as he considers practicable,* apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with' the Uniform Code." J.A. 113 (emphasis added).

In the first instance, it is unprecedented for a court to look outside the delegatory legislation for an "intelligible

principle'' guiding the delegated power. In all other delegation cases decided by this Court, the legislation delegating congressional power also established the principles and policies to be utilized in exercising the delegated powers. *See, e.g., Touby v. United States,* 500 U.S. 160, 163-167 (1991); *Skinner v. Mid-America Pipeline Co.,* 490 U.S. 212, 224 (1989); *Mistretta,* 488 U.S. at 374-76. Thus, *ab initio,* if U.C.M.J. article 36 sets forth Congress' guidance to the President, it must be article 36 which delegates authority to the President. Moreover, even assuming arguendo that U.C.M.J. article 36 is the appropriate statute to consider in determining whether Congress has set forth an intelligible principle, this statute does not provide sufficient guidelines for the President or establish Congressional policy with respect to the aggravating factors required to narrow the class of servicemembers eligible for the death penalty.

A. The margin of indefiniteness of Congressional guidance in delegations of authority is narrowed in capital cases.

This Court has on many occasions approved broad delegations of Congressional authority based on the practical recognition that ''in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot [in some instances] do its job absent an ability to delegate power.''[19] *Mistretta,* 488 U.S. at 372. Indeed, this Court has always followed a ''common sense'' approach which considers all of the circumstances surrounding the need for and limits of the delegation. *J.W. Hampton, Jr. & Co.,* 276 U.S. at 406.

In applying this flexible ''intelligible principle'' standard, this Court has repeatedly recognized that in delega-

[19]Creating aggravating circumstances to determine who is eligible for a death sentence, however, is not one of those instances where Congress is unable to perform its task without delegating authority. *See infra* at 39-40.

tions of *administrative* authority, Congress need not ''supply administrative officials with a specific formula for their guidance.'' *Lichter v. United States,* 334 U.S. 742, 785 (1948). On the other hand, w'en criminal sanctions or individual liberties are involved, the flexibility and the ''area of permissible indefiniteness [in Congressional delegations of authority] narrows.'' *United States v. Robel,* 389 U.S. 258, 275 (1967) (Brennan, J., concurring) (citations omitted); *Greene v. McElroy, supra; Kent v. Dulles, supra; see also United States v. L. Cohen Grocery Co.,* 255 U.S. 81 (1921). Thus, while broad delegations of authority may be appropriate in some instances, this Court has, at least implicitly,[20] demanded that Congress provide far more specificity of purposes, goals, and factors to be considered when delegating authority which touches upon criminal offenses and penalties or individual liberties.

For example, in *Mistretta,* this Court found that adequate standards had been laid down by Congress to guide the discretion of the Sentencing Commission. To name only a few, Congress by legislative act set forth the goals and purposes of sentencing which should guide the Commission; specifically directed the Commission to establish guidelines to determine sentencing ranges and to set forth specific formulas for determining sentencing ranges, including a baseline; directed the Commission, in formulating offense categories, to consider specific factors, and prohibited consideration of other factors, 488 U.S. at 374-76; and, ''enumerated various aggravating and mitigating circumstances'' to provide some guidance to the Commission. *Id.* at 377.

[20]This Court in practice has demanded that delegations in the criminal context be far more specific than in others, *see, e.g., Mistretta* and *Touby,* but declared in *Touby* that ''[o]ur cases are not entirely clear as to whether or not more specific guidance is in fact required.'' 500 U.S. at 166. The Court declined to resolve the issue, however, because the statute involved in *Touby* ''passes muster even if greater congressional specificity is required in the criminal context.'' *Id.*

Likewise, the statute at issue in *Touby v. United States*, 500 U.S. 160 (1991), set forth principles for the Attorney General to follow in temporarily scheduling "designer drugs" as a controlled substance on an expedited basis in order "to avoid an imminent hazard to the public safety." *Id.* at 163-67. The statute required the Attorney General to consider multiple factors, and in addition, to satisfy the conditions of another section that identified criteria for adding a substance to each of five schedules. *Id.* Thus, this Court concluded: "Congress has placed multiple specific restrictions on the Attorney General's discretion to define criminal conduct." *Id.* at 167.

Moreover, even assuming that the margin of indefiniteness of Congressional guidance is no different in delegations of legislative authority in the criminal context, it is certainly narrowed in capital cases. "Death . . . is in a class by itself," *Furman*, 408 U.S. at 289 (Brennan, J., concurring), and "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination," *California v. Ramos*, 463 U.S. at 998-99. The "heightened standard" of review required in capital cases, *see Simmons v. South Carolina*, ___ U.S. ___, 114 S.Ct. 2187, 2198 (1994) (Souter, J., joined by Stevens, J., concurring), makes clear that Congress has not laid down an intelligible principle to guide the President in establishing aggravating factors.

B. U.C.M.J. article 36 does not address capital cases or Congressional policy or guidance for establishing the aggravating factors required to narrow the class of persons eligible for the death penalty.

Unlike the statutes at issue in *Mistretta* and *Touby*, U.C.M.J. article 36 provides no statements of Congressional policy or factors to be considered in establishing

aggravating factors. Thus, even if Congress did intend to delegate authority to the President to establish aggravating factors for military capital trials, it did not provide any guidance whatsoever for the President to follow in doing so. Indeed, Congress did not even mention the death penalty.

The lack of Congressional guidance violates the Constitution because Congress allowed the President "virtually unfettered" discretion in establishing aggravating factors to be applied in capital cases. *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935) (authority conferred by legislative act which "supplies no standards" is "an unconstitutional delegation of legislative power"). The Constitution demands far more when deciding who shall receive the harshest criminal sanction known to the law.

1. The instruction to follow "principles of law" applied in the United States District Courts provided no guidance to the President for establishing aggravating factors in capital trials.

There were virtually no "principles of law" recognized in capital trials in the district courts at the time the President adopted R.C.M. 1004 in 1984. After this Court's opinion in *Furman* in 1972, the first Congressional enactment relating to the death penalty came in 1974 when Congress authorized the death penalty for aircraft piracy and set forth a list of aggravating factors, at least one of which had to be found, before a death sentence could be imposed. 49 U.S.C. §§ 1472 & 1473.[21] Congress did not

[21] 49 U.S.C. § 1472 was recodified as 49 U.S.C. § 46502 in July 1994. 49 U.S.C. § 1473 was recodified as 49 U.S.C. § 46503 in July 1994 and repealed in September 1994. The aggravating circumstances that now apply to aircraft piracy are found in 18 U.S.C. § 3592, which was enacted in September 1994.

enact any other death penalty legislation until after the President promulgated R.C.M. 1004. Thus, at the time of the President's action, the 1974 aircraft piracy legislation was the only available "principle of law," potentially relevant to Article 36(a), which pertained to aggravating circumstances to be applied in capital sentencing hearings in the United States District Courts.

In an attempt to skirt this dilemma, the government argued in its Brief in Opposition to the Petition for Writ of Certiorari that the "'principles of law' recognized by the district courts include constitutional rules established by this Court's capital punishment decisions." In addition, the government noted that this Court favorably cited the Model Penal Code[22] in *Gregg* and upheld the Georgia capital punishment scheme "which generally follows the Model Penal Code." BIO at 15-16. From this argument, the government sought to elicit *Congressional* guidance.

While the Court's opinions are certainly binding on United States District Courts, this Court has never created aggravating factors to be applied in capital cases. Indeed, this Court has specifically indicated that the determination of substantive aggravating factors and procedures to be used in capital cases is a decision that must be made by the legislatures of the various jurisdictions. *See, e.g., Blystone v. Pennsylvania,* 494 U.S. 299, 309 (1990). Moreover, while this Court has certainly found a number of aggravating factors to be constitutional in the last twenty-five years, these aggravating factors have no force of law except in the jurisdictions whose legislatures enacted them. In addition, while this Court may have cited the Model Penal Code with approval, it also has no force of law unless accepted by a legislature.

Even assuming, however, that this Court's opinions approving aggravating circumstances selected by state legislatures and listed in the Model Penal Code are

[22] ALI, Model Penal Code, § 210.6, pp. 107-10 (Rev. Ed. 1980).

included in the "principles of law" which the President is instructed to consider, at the time R.C.M. 1004 was created there were thirteen U.C.M.J. articles for which the death penalty was an authorized punishment and eleven of these articles related to purely military offenses which had no parallel in civilian jurisdictions.[23] Only two articles having death as an authorized punishment, Article 118 (murder) and Article 120(a) (rape), were comparable to civilian law. Thus, for eleven of the thirteen offenses the President was left with absolutely no guidance from the "principles of law" applicable in United States District Courts or even state courts. For the other two offenses, the President was left free to select at will from the smorgasbord of aggravating factors used by the states and the Model Penal Code or simply to create them.

Given these facts, the lower court's finding that the aggravating factors established by the President "reflect policy expressed by Congress in 'various statutes—including several punitive articles of the Uniform Code of Military Justice—and also conform generally with the Model Penal Code and with policies expressed in the statutes of many of the 36 states which authorize the death penalty," J.A. 113-14, is of no legal significance. In the first instance, the "various statutes" enacted by Congress, upon which the lower court relied to find (or create) Congressional policy in support of R.C.M. 1004, do not (with the exception of Article 106a and 49 U.S.C. § 1472)

[23] Article 85(c), 10 U.S.C. § 885(c) (desertion in time of war); Article 90(2), 10 U.S.C. § 890(2) (willful disobedience of a lawful order in time of war); Article 94(b), 10 U.S.C. § 894(b) (mutiny, sedition, or failure to suppress or report a mutiny or sedition); Article 99, 10 U.S.C. § 899 (misbehavior before the enemy); Article 100, 10 U.S.C. § 900 (attempting to compel or compelling a commander to surrender); Article 101, 10 U.S.C. § 901 (improper use of countersign in time of war); Article 102, 10 U.S.C. § 902 (forcing a safeguard); Article 104, 10 U.S.C. § 904 (aiding the enemy); Article 106, 10 U.S.C. § 906 (spying in time of war); Article 110(a), 10 U.S.C. § 910(a) (improper hazarding of vessel); and Article 113, 10 U.S.C. § 913 (misbehavior of sentinel in time of war).

include aggravating factors to be applied when death is an authorized punishment. Therefore, these non-capital statutes cannot possibly reflect Congressional policy concerning aggravating factors to narrow the class of persons eligible for a sentence of death.

Secondly, Article 106a and 49 U.S.C. § 1472 provided no guidance to the President. The aggravating factors in Article 106a could not have been considered by the President in 1984 because they were not enacted until 1985. Similarly, although 49 U.S.C. § 1472 existed in 1984, the aggravating factors established by the President in R.C.M. 1004(c) have almost no similarity to the aggravating factors set forth by Congress in 49 U.S.C. §§ 1472 and 1473.

Finally, the extent (if any) to which the aggravating factors of R.C.M. 1004(c) conform to the standards set forth in the Model Penal Code and state statutes is irrelevant to the issues of *Congressional* intent and the rules established by Congress for application in the district courts. The question is not whether the aggravating factors found in R.C.M. 1004(c) would be constitutional if established in an appropriate manner. Rather, the issue is whether the President had authority *ab initio* to establish aggravating factors and whether Congress provided sufficient guidelines to exercise that authority. The Model Penal Code and state statutes shed no light on this inquiry and Congress could not, even if it intended to do so, simply instruct the President to refer to state laws or the Model Penal Code for guidance. *Cf. Washington v. W.C. Dawson,* 264 U.S. 219 (1924); *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149 (1920).

2. Even assuming that the "principles of Law" Clause of U.C.M.J. article 36 provides some guidance to the President, the President is instructed to follow this guidance only in so far as "he considers practicable."

Even if one assumes that U.C.M.J. article 36's reference to the "principles of law" applicable in United States District Courts gives some hint as to Congressional policy and provides some guidance to the President, he is free to follow this guidance only in so far as "he considers practicable."[24] Thus, the President is left with the liberty to pick and choose as he pleases. *See, e.g., Industrial Union Dep't v. American Petroleum Inst.,* 448 U.S. at 675, 682 (Rehnquist, J., concurring) (the language "to the extent feasible" excuses the delegate from the duty to follow the specific Congressional guidance given).

In this regard, petitioner's case is very similar to *Schecter Poultry.* In the National Industrial Recovery Act, Congress delegated authority to the President to establish codes of fair competition for the purpose of rehabilitation of industry and industrial recovery. However, Congress set forth only its broad policy and gave the President unfettered power. This Court found that although Congress stated a policy, it left the President with power to "impose his own conditions, adding to or taking from what is proposed, as 'in his discretion' he thinks necessary 'to effectuate the policy' declared by the act." 295 U.S. at 538-39. Thus, the Court found that even though Congress

[24] Although this language was included, some concern was expressed prior to enactment that the phrase "so far as practicable" is "dangerous" because "it completely nullifies everything that you have laid down." *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services,* 81st Cong., 1st. Sess. (1949), *reprinted in* Index and Legislative History of the Uniform Code of Military Justice, at 1017 (1950) (Statement of Representative Charles Elston).

intended a delegation to the President, it left the President with unfettered discretion. The lack of Congressional guidance rendered the delegation unconstitutional. *Id.*

Even the lower court's opinion in *Curtis* indicates that the President exercised unfettered discretion without any guidance from Congress. In discussing the origin of each aggravating factor and its similarities with other laws, the lower court cited U.C.M.J. provisions, including Article 106a (which was not even in existence at the time the President selected aggravating factors for inclusion in R.C.M. 1004(c)); federal statutes; Article I of the Constitution; the law of war; the "Law of Nations;" this Court's opinions; state court opinions; state statutes; and its own opinions. J.A. 114-20. Clearly, the President was not acting pursuant to Congressional guidance, but in accordance with his own determinations and unfettered discretion as to what the aggravating factors should be.[25]

In *Solorio v. United States*, 483 U.S. 435, 447 (1987), this Court made clear that "Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military." *See also Chappell v. Wallace*, 462 U.S. 296, 301 (1983) (Congress has "plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline"). Even assuming that Congress implicitly delegated authority to the President, Congress has not taken responsibility for balancing individual rights against the government and has not established any intelligible principle for the President to follow. Rather, Congress granted the President complete discretion to apply any principles or rules that he chooses. The

[25] For instance, the aggravating factor that "the murder was committed with intent to obstruct justice," R.C.M. 1004(c)(7)(H), J.A. 136, has no similar provisions in any state or federal death penalty statute or the Model Penal Code.

Constitution demands much more in the exercise of legislative authority by the President which will ultimately result in the execution of servicemembers. *See generally Weiss v. United States*, ___ U.S. ___, 114 S.Ct. 752, 769 (1994) (Ginsburg, J., concurring) (quoting *Winters v. United States*, 89 S.Ct. 57, 59-60) (1968) (Douglas, J., opinion in chambers)) ("A member of the Armed Forces is entitled to equal justice under law not as conceived by the generosity of a commander but as written in the Constitution").

IV. PURSUANT TO THE DOCTRINE OF SEPARATION OF POWERS AND THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION, THE ESTABLISHMENT OF AGGRAVATING FACTORS TO BE USED IN MILITARY CAPITAL CASES TO NARROW THE CATEGORY OF PERSONS ELIGIBLE FOR THE DEATH PENALTY IS A LEGISLATIVE DECISION VESTED EXCLUSIVELY IN CONGRESS AND CANNOT BE DELEGATED TO THE PRESIDENT.

In our tripartite system of government, the Congress shall write the laws (Article I), the Executive shall implement the laws (Article II), and the Judiciary shall interpret the laws (Article III). Moreover, "the intent of the Framers [was] that the powers of the three great branches of the National Government be largely separate from one another." *Buckley v. Valeo*, 424 U.S. 1, 120 (1976). Article I, § 1, specifically vests "[a]ll legislative powers" in the Congress. While Congress may under some circumstances seek assistance from the other branches, the extent and character of that assistance is delineated by the structure of the Constitution, specific constitutional limitations, as well as by "common sense and the inherent necessities of the governmental co-ordination." *J.W.*

Hampton, Jr. & Co. v. United States, 276 U.S. at 406; *see also Union Bridge Co. v. United States,* 204 U.S. 364 (1907).

In the military context, just as in the civilian context, the Constitution provides that the Congress must make all laws, i.e., the Congress must legislate. U.S. Const. art. I, § 8, cl. 14. The Congress is specifically charged "to make rules for the government and regulation of the land and naval forces." *Id.* This unqualified power is as plenary as the other grants of authority in Article I, *Solorio,* 483 U.S. at 441, 446, and vests in "Congress, rather than the Executive, authority to make rules for the government of the military," *id.* at 446, "including, of course, the punishment of military offenses," Duke & Vogel, 13 Vand. L. Rev. at 447-48; *see also* Grant W. Nelson & James E. Westbrook, *Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses; An Analysis of O'Callahan v. Parker,* 54 Minn. L. Rev. 1, 18 (1969).

Likewise, in the military context, just as in the civilian context, the Constitution provides that the President is the executive or the Commander in Chief, i.e. the President must implement the laws. U.S. Const. art. II, § 2, cl. 1. The only difference in treatment for members of the armed forces contemplated by the Framers is that servicemembers are tried not by Article III courts but by courts created by the Congress under its Article I powers. *Weiss,* 114 S.Ct. at 755. Thus, in determining who shall make the laws and who shall implement them, the members of the military are not, and can not, be treated differently than other citizens of this country.

A. Congress, as the elected representatives of this nation, must make the moral policy judgment to determine which servicemembers will be eligible for the death penalty.

In the military context, just as in the civilian, Congress cannot delegate the power to make laws. As this Court declared in *Field v. Clark,* 143 U.S. 649 (1892):

> The true distinction. . .is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

Id. at 693-94 (quoting *Cincinnati, W. & Z.R. Co. v. Comm'rs of Clinton Co.,* 1 Ohio St. 77, 88-89 (1852)). This Court has recognized, however, that the Constitution does allow Congress some flexibility because "legislation must often be adapted to complex conditions involving a host of details with which the national Legislature cannot deal directly." *Panama Refining Co. v. Ryan,* 293 U.S. 388, 421 (1935). More specifically, this Court has recognized in a number of instances that there are some areas:

> where Congress may wish to exercise its authority in a particular field, but because the field is sufficiently technical, the ground to be covered sufficiently large, and the Members of Congress themselves not necessarily expert in the area in which they choose to legislate, the most that may be asked under the separation-of-powers doctrine is that Congress lay down the general policy and standards that animate the law, leaving the agency [or the President] to refine

those standards, "fill in the blanks," or apply the standards to particular cases.

Industrial Union, 448 U.S. at 675 (Rehnquist, J., concurring); *see also American Power & Light Co.,* 329 U.S. at 105. Establishing aggravating factors in capital cases, however, is not a broad field which is complex or technical or in which Congress needs expert assistance.

Since *Furman v. Georgia,* thirty-eight state legislatures have passed statutes authorizing capital punishment and setting forth the aggravating factors necessary to the determination of who shall live and who shall die. NAACP Legal Defense Fund, Inc., *Death Row, U.S.A.* (Summer 1995). In addition, Congress has enacted several statutes which establish aggravating circumstances to be applied in capital trials in the United States District Courts. 18 U.S.C. § 3592; 21 U.S.C. § 848. Finally, Congress has even enacted a statute, applicable to servicemembers, which establishes aggravating factors solely for the crime of espionage. U.C.M.J. article 106a. Thus, Congress is clearly capable of making these determinations.

While Congress must have some flexibility, especially when dealing with complex or technical issues in which expertise is required, this Court has never allowed Congress to avoid its responsibility to make *all* policy decisions and judgments which are commensurate with its role as the elected representatives of the American people, which includes balancing "the rights of men in the armed forces. . .[with] demands of duty and discipline." *Burns v. Wilson,* 346 U.S. 137, 139 (1953). As Justice Scalia has observed:

> It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded. Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature.

Mistretta, 488 U.S. at 415 (Scalia, J., dissenting). Likewise, Chief Justice Rehnquist has observed that there are some "difficult issues," such as life and death decisions,[26] that confront Congress which it alone must decide because "Congress [is] the governmental body best suited and most obligated to make the choice." *Industrial Union,* 448 U.S. at 672 (Rehnquist, J., concurring). The decision concerning which members of the Armed Forces will be eligible for the death penalty is no doubt a policy and moral judgment which must be made by Congress. *See* argument *supra* at 19-20.

B. The President is not granted constitutional prerogative to take legislative action for the sake of expedience.

The government in its Brief in Opposition to the Petition for Writ of Certiorari asserted that it is "sensible" for the President to establish aggravating factors because he is in the best position to act "quickly." BIO at 19. Undoubtedly, the legislative process is slow and cumbersome at times and is charged with political controversy. To accept the government's argument, however, and allow Congress to shift its legislative responsibility to the President is tantamount to ignoring the Constitution and the intent of the Framers. *See INS v. Chadha,* 462 U.S. at 951 (the Framers intended "that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure"); *Youngstown Sheet & Tube Co.,* 343 U.S. at 655 (Jackson, J.,

[26] The decision discussed by Chief Justice Rehnquist at the time was "whether the statistical possibility of future deaths should ever be disregarded in light of the economic costs of preventing those deaths." *Industrial Union,* 448 U.S. at 672 (Rehnquist, J., concurring).

concurring) (''With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations'').

1. The Framers of the Constitution intended that Congress, not the President, make the rules and regulations for the Armed Forces.

The Framers of the Constitution were cognizant and fearful of military court-martials even for members of the military. As this Court recognized in *Reid v. Covert,* 354 U.S. at 23-24, ''The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds. Their fears were rooted in history.'' *See also Lee v. Madigan,* 358 U.S. at 232 (''The attitude of a free society toward the jurisdiction of military tribunals—our reluctance to give them authority to try people for nonmilitary offenses—has a long history'').

The Framers were mindful that English rulers tried to rule the country through the army and without the input of Parliament. Contrary to the common law, soldiers were tried in peacetime by court-martial for non-military offenses, including capital offenses. This pattern was continued until 1689 when the Declaration of Rights placed control of the military in the legislature. Duke & Vogel, at 444. Parliament exercised its authority by limiting the peacetime power of courts-martial over servicemembers. In the first Mutiny Act, Parliament allowed courts-martial, in peacetime, only for mutiny, sedition, and desertion which were punishable by death. *Solorio v. United States,* 483 U.S. at 442 (citing Mutiny Act of 1689, 1 Wm. & Mary, ch. 5).

This country's own history was marred by military excesses on behalf of the Executive. In the early days of

this nation, American colonists were tried by courts-martial and executed without regard to the existence of civil laws and civil courts to punish all offenses. *Reid,* 354 U.S. at 27-28 (citing 1 Wells, The Life and Public Services of Samuel Adams, 231). Because of this history, the Framers placed control of the military, including the policy judgments concerning the offenses and punishments to be applied in military courts, in Congress. Duke & Vogel, at 447-48. The ''profound fear and distrust of military power [under the control of the executive],'' is reflected in the plain language of the Constitution. *Reid,* 354 U.S. at 29 (citing Art. I, §§ 8 and 9; Art. II, § 2; Art. III; and Amendments II, III, V, and VI); *see also Solorio,* 483 U.S. at 446 (English history shows a strong desire to transfer the control of court-martial jurisdiction from the executive to the legislature, thus in our Constitution ''Congress, and not the Executive, was given authority to make rules for the regulation of the Armed Forces'').

2. The Framers of the Constitution intended in the Eighth Amendment to prohibit all punishments that were not specifically authorized by the legislature.

The specific language of the Eighth Amendment prohibits ''cruel and unusual punishments.'' While there has been much debate about other aspects of this amendment, it is clear that the Framers intended to prohibit all punishments that were not determined and specifically authorized by the legislature.

The precursor of the Eighth Amendment is the ''cruell and unusual Punishments'' clause of the English Declaration of Rights of 1689. *Harmelin v. Michigan,* 501 U.S. 957, 965 (1991) (Opinion of Scalia, J., joined by Rehnquist, C.J.). The English provision, in turn, was prompted by the abuses of Lord Chief Justice Jeffreys,

who while sitting as a judge during the Stuart reign of James II, created punishments that were not "authorized by the common-law precedent or statute." *Id.* at 968; *Furman v. Georgia,* 408 U.S. at 317-19 (Marshall, J., concurring). The Preamble to the Declaration of Rights declared that James II had endeavored to "subvert" the "laws and liberties of this kingdom" by arbitrarily "assuming and exercising a power of dispensing with and suspending of laws and the execution of laws, without consent of parliament." The Declaration then continued by denouncing "arbitrary and illegal courses" and "illegal and cruel punishments" in prosecutions in the Court of the King's Bench. Declaration of Rights, 1 Wm. & Mary, Sess. 2, ch. 2 (1689) (quoted in *Harmelin,* 501 U.S. at 969). These statements were prompted by a number of cases in which various types of punishment, which had not been authorized by common law or Parliament, were pronounced by Judges of the King's Bench. *Harmelin,* 501 U.S. at 969-71; *see also* Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning,* 57 Calif. L. Rev. 839 (1969).

The most prominent example of executive and judicial abuse of authority was the case of Titus Oates, who was convicted of perjury in 1685. He had been convicted of giving false testimony during the "Popish Plot" trials of 1678-79, and had been sentenced to be defrocked of his "Canonical Habits," to serve a term of life imprisonment, to pay a large fine, to be twice severely whipped, and to stand in the pillory at various times during the year. This sentence was illegal, however, in several specifics, including the fact that only an ecclesiastical court could strip a person of "Canonical Habits" and there were no precedents authorizing whipping or life imprisonment for perjury. *Id.* (citing 1 Journals of the House of Lords 367 (May 31, 1689), quoted in *Second Trial of Titus Oates,* 10 How. St. Tr. 1227, 1325 (K.B. 1685)). Four years later,

while the Declaration of Rights was pending in Parliament, Oates appealed his conviction to the House of Lords. Oates' conviction and sentence were affirmed by the House of Lords, over a vigorous dissent which declared that the punishments were "contrary to Law and ancient practice" and were "cruel, barbarous, and illegal." Members of the House of Commons then passed a bill to annul Oates' sentence and indicated clearly therein that the "cruel and unusual punishments" provision of the Declaration of Rights was passed to prevent just these types of abuses. *Id.* at 971-73 (citing 10 Journal of the House of Commons 247 (Aug. 2, 1689)).

As Justice Scalia (joined by Chief Justice Rehnquist) observed:

> In all these contemporaneous discussions, as in the prologue of the Declaration, a punishment is. . .considered objectionable . . .because it is "out of [the Judges'] Power," "contrary to Law and ancient practice," without "Precedents" or "express Law to warrant," "unusual," "illegal," or imposed by "Pretense to a discretionary Power." Moreover, the phrase "cruell and unusual" is treated as interchangeable with "cruel and illegal." In other words, the "illegal and cruell Punishments" of the Declaration's prologue are the same thing as the "cruell and unusual Punishments" of its body.

Harmelin, 501 U.S. at 972 (internal citations and footnotes omitted). Thus, it is clear that the Eighth Amendment was intended to prohibit the Executive and the Judiciary from imposing criminal sanctions that were not recognized or established as legal by the Legislature. *See Gregg v. Georgia,* 428 U.S. at 169; *In re Kimmler,* 136 U.S. 436, 446-47 (1890).

Thus, the fact that it is easier and quicker for the President to establish aggravating factors in military capital

cases does not satisfy the constitutional concerns. The Framers of the Constitution were aware—and intended—that it be more difficult for the legislature to make law than to allow a single Executive to do so. *See* David Schoenbrod, Power Without Responsibility 29 (Yale Univ. Press 1993) (Framers created a "super majority" rule which requires both Houses of congress *and* the President to enact laws). As this Court has observed:

> the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmark—of democratic government.

Chadha, 462 U.S. at 944.

This is a country founded on fear of an executive who is too powerful, fear of an executive and judges authorizing sentences without authorization from the legislature, and fear of a military that tries citizens and soldiers in capital cases at will. *See Youngstown Sheet & Tube Co.,* 343 U.S. at 633 (Douglas, J., concurring) ("The Framers with memories of the tyrannies produced by a blending of executive and legislative power rejected that political arrangement"). Thus, it is strange that the United States Government argues that Congress need not make the determination of what aggravating factors will be used in military capital cases to determine which of our servicemembers shall live and which shall die. "[I]t is not too much to ask that the citizen army of a democracy be given that fundamental fair play and assurance of justice which our country is trying to give to the rest of the world." *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services,* 81st Cong., 1st Sess. (1949), *reprinted in* Index

and Legislative History of the Uniform Code of Military Justice, at 640 (1950) (Statement of Richard H. Wels, Chairman, Special Committee of Military Justice of the New York County Lawyers' Association); *see also Middendorf v. Henry,* 425 U.S. at 63 (Marshall and Brennan, JJ., dissenting) ("denial of traditional rights to any group should not be approved without examination, especially when the group comprises members of the military, who are engaged in an endeavor of national service, frequently fraught with both danger and sacrifice").

"It is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people." *Industrial Union,* 448 U.S. at 687 (Rehnquist, J., concurring). Congress must not be allowed to abdicate its responsibility as the voice of society's moral conscience. *Id.* at 686 (the Court "ought not to shy away from [its] judicial duty to invalidate unconstitutional delegations of legislative authority"). If the military is to execute servicemembers, then Congress must, by legislation establishing aggravating factors, make the moral determination of which servicemembers are to be subjected to a sentence of death. *See McGautha v. California,* 402 U.S. 183, 271 (1971) (Brennan, J., dissenting) ("A legislature that has determined that the [government] should kill some but not all persons whom it has convicted of certain crimes must inevitably determine how the [government] is to distinguish those who are to be killed from those who are not").

C. Even assuming that Congress may delegate its legislative authority to establish aggravating factors in military capital cases, it may not make that delegation to the Commander in Chief because he already exercises executive and judicial control of the military.

Although *Mistretta* does not control the outcome of this case,[27] this Court specifically recognized therein the dangers involved when Congress tries to confer upon the Executive the power to promulgate sentencing guidelines.[28] Such an attempt "unconstitutionally. . .unite[s] the power to prosecute and the power to sentence within one Branch." 488 U.S. at 391 n.17. The constitutional problem this Court anticipated in *Mistretta* is realized in petitioner's case.

Pursuant to his authority under Article II, § 2 of the United States Constitution, the President, as Commander in Chief of the Armed Forces, is ultimately responsible for the prosecution of all offenses committed by members of the Armed Forces. In addition, the President as Commander in Chief, supervises the convening authorities, who in turn convene the court-martial tribunal and select the members to determine both guilt and sentence. *See Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Senate Comm. on Armed Services,* 81st Cong., 1st Sess. (1949), *reprinted in*

[27] In *Mistretta*, this Court merely assumed "without deciding" that Congress could and had granted the Sentencing Commission authority in the capital case arena. 488 U.S. at 378 n.11.

[28] In *Mistretta*, Congress delegated authority to promulgate noncapital sentencing guidelines to an independent Sentencing Commission within the *judicial* branch rather than the Executive Branch, because:

> Giving such significant control over the determination of sentences to the same branch of government that is responsible for the prosecution of criminal cases is no more appropriate than granting such power to a consortium of defense attorneys.

H.R. Rep. No. 1017, 98th Cong. 2d Sess. 95 (1984).

Index and Legislative History of the Uniform Code of Military Justice, at 113-18 (statement by Committee on the Judiciary, United States Senate, on a Uniform Code of Military Justice).[29] Likewise, military judges at the trial and appellate levels are appointed as judges by The Judge Advocates General of the respective services, who are responsible to the President. *Weiss v. United States,* ___ U.S. ___, 114 S.Ct. 752 (1994); *see also Ryder v. United States,* ___ U.S. ___, 115 S.Ct 2031 (1995). Further, in addition to having the inherent constitutional power, Article II, § 2, cl. 1, to pardon or commute criminal sentences, *Schick v. Reed,* 419 U.S. 256, 266 (1974), the President is specifically assigned, under U.C.M.J. article 71(a), 10 U.S.C. § 871(a), the task of reviewing and approving all sentences of death once direct review by the military courts is completed and the sentence is affirmed or certiorari is denied by this Court.

To permit Congress to delegate its legislative authority to the President places within the Executive the power to determine the class of military offenders eligible for the death sentence, the power to determine that a military offender should receive the death penalty, the power to convene the court-martial and select both its members and the judge, and the final power to grant or withhold clemency once a petitioner's direct appeal is completed. This "blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers." *Reid,* 354 U.S. at 39.

[29] During those hearings, it was observed:

> Not belonging to the judicial branch of the Government, it follows the courts martial must pertain to the executive department; and they are in fact simply instrumentalities of the Executive power, provided by Congress for the President as Commander in Chief, to aid him in properly commanding the Army and Navy and enforcing discipline therein.

Id. at 115.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the United States Court of Appeals for the Armed Forces.

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